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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

IN RE: RALPH MILLER,
*Debtor,*

RALPH MILLER,
*Petitioner,*

v.

FIRST FEDERAL OF MICHIGAN,
*Respondent.*

IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
*Debtors,*

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
*Petitioners,*

v.

MAXINE WYNN AND MANOR MORTGAGE CO.,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS


| | | Page |
|---|---|---|
| APPENDIX A: | Opinions and Orders of the Circuit Court of Appeals for the Sixth Circuit | 1a |
| | Opinion of the Court of Appeals for the Sixth Circuit in *In re Glenn* (April 16, 1985) | 1a |
| | Order of the Court of Appeals for the Sixth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc in *In re Miller* (June 3, 1985) | 32a |
| | Order of the Court of Appeals for the Sixth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc in *In re Pigloski* (June 3, 1985) | 33a |
| | Judgment of the Court of Appeals for the Sixth Circuit in *In re Miller* (June 11, 1985) | 34a |
| APPENDIX B: | Opinions and Orders of the District Courts | 36a |
| | Opinion of the Eastern District of Michigan in *In re Miller* (July 18, 1983) | 36a |
| | Order of the Eastern District of Michigan in *In re Miller* (July 18, 1983) | 46a |
| | Memorandum Opinion and Order Affirming Order of Bankruptcy of the Eastern District of Michigan in *In re Pigloski* (March 29, 1983) | 47a |
| | Judgment of the Eastern District of Michigan in *In re Pigloski* (March 31, 1983) | 54a |
| APPENDIX C: | Opinions and Orders of the Bankruptcy Courts | 55a |
| | Order Denying Debtor's Motion for Stay Order Tolling the Redemption Period of the Bankruptcy Court for the Eastern District of Michigan in *In re Miller* (December 2, 1982) | 55a |

TABLE OF CONTENTS—Continued

Page

Order Granting Relief from Automatic Stay and Denying Confirmation of the Bankruptcy Court for the Eastern District of Michigan in *In re Miller* (January 24, 1983) ..... 57a

Opinion of the Bankruptcy Court for the Eastern District of Michigan rendered from the bench May 18, 1982 in *In re Pigloski*. Transcript of proceedings, pp. 19-29 ..... 59a

Order Dissolving Temporary Restraining Order and Prohibiting the Inclusion of Debtors' Personal Residence in a Filed Chapter 13 Plan Nunc Pro Tunc to May 18, 1982 and Staying Effect.... 66a

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 82-3821, 83-1316, 83-1585

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IN RE: GERALD DAVID GLENN AND
JANICE SUE GLENN,
*Debtors,*

THE FEDERAL LAND BANK OF LOUISVILLE,
*Creditor-Appellant,*
v.

GERALD DAVID GLENN AND
JANICE SUE GLENN, (82-3821)
*Debtors-Appellees.*

On Appeal from the United States Bankruptcy Court
for the Southern District of Ohio

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IN RE: EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
*Debtors,*

EDWARD J. PIGLOSKI AND
MARY L. PIGLOSKI,
*Plaintiffs-Appellants,*
v.

MAXINE WYNN AND MANOR MORTGAGE
COMPANY, (83-1316)
*Defendants-Appellees.*

On Appeal from the United States District Court
for the Eastern District of Michigan

---

IN RE: RALPH MILLER,
*Debtor,*

FIRST FEDERAL OF MICHIGAN,
*Defendant-Appellant,*
v.

RALPH HENRY MILLER, (83-1585)
*Plaintiff-Appellee.*

On Appeal from the United States District Court
for the Eastern District of Michigan

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Decided and Filed April 16, 1985

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Before: ENGEL and KRUPANSKY, Circuit Judges; WEICK, Senior Circuit Judge.

ENGEL, Circuit Judge. These three appeals raise similar questions about the point in the foreclosure process at which a Chapter 13 debtor loses the right to cure a default on a real estate mortgage on his principal residence.

In each case, the debtor gave a mortgage on real estate that was subject to foreclosure proceedings. In *In re Gerald David Glenn*, No. 82-3821, the debtors filed their Chapter 13 petition after the mortgagee had obtained a foreclosure judgment but before the property was sold. In *In re Ralph Miller*, No. 83-1585, and *In re Edward J. Pigloski*, No. 83-1316, the debtors filed their petitions after the properties had been sold at foreclosure sales but before the statutory redemption periods had run. The debtors in all three cases seek to protect their interests in the real estate by paying off any arrearages through their Chapter 13 plans and resuming the regular mortgage payments. The mortgagee in each case has objected that this treatment is contrary to the provisions of 11 U.S.C. § 1322(b).

Each appeal also raises at least one additional issue. In *Glenn*, the debtors argue that, pursuant to 11 U.S.C. § 1322(b)(2), their Chapter 13 plan may modify the rights of their creditor because the creditor's security interest is in a parcel that includes not only their principal residence, but also fifty acres of adjoining farmland. Should they not be permitted to reinstate the terms of their mortgages, the debtors in *Miller* and *Pigloski* seek a ruling that would toll the running of the statutory redemption periods for the duration of their Chapter 13 plans. The Pigloskis also claim that they should be allowed to spread the payment of the redemption amount over the entire length of their Chapter 13 plan while the debtor in *Miller* argues that the expiration of the redemption period following the foreclosure sale would constitute a preferential transfer that may be avoided under 11 U.S.C. § 547(b).

## I.

GERALD DAVID and JANICE SUE GLENN (82-3821)

In October 1978 the Glenns bought their home and the fifty acres of land on which it is located in Fayetteville, Ohio. They made a $20,000.00 down payment and gave a first mortgage promissory note to the Federal Land Bank of Louisville to finance the balance of the purchase price. The Glenns also delivered a mortgage deed to the bank. The note required the payment of $2850.00 every six months and contained an acceleration clause giving the bank the option to declare the entire debt due and payable immediately should the Glenns fail to make any payments.

The Glenns subsequently failed to make some of the mortgage payments, and the bank accelerated the debt. When the Glenns failed to pay the accelerated amount, the bank commenced foreclosure proceedings. On December 18, 1981, the Court of Common Pleas of Brown County, Ohio entered a foreclosure judgment against the

Glenns for $51,991.95. Later that same day, the Glenns filed their Chapter 13 petition with the bankruptcy court.

Under the terms of their Chapter 13 plan, the Glenns proposed to pay the bank the arrearage on the mortgage over a period of twenty-one months while maintaining current payments outside the plan under the original terms of the note. The bank objected to the plan, arguing that the note and mortgage had been merged and reduced to judgment and that the Glenns currently owed not just the amount they were in arrears but the entire judgment amount. The bankruptcy court overruled the bank's objection and confirmed the plan. Relying upon the rationale of the Second Circuit in *In re Taddeo*, 685 F.2d 24 (2d Cir. 1982), the court held that 11 U.S.C. § 1322 (b)(5) permitted the Glenns to "deaccelerate" their mortgage and reinstate the original payment schedule.

The parties agreed to a direct appeal to our court pursuant to 28 U.S.C. § 1293(b).

RALPH MILLER (83-1585)

On August 5, 1980, Ralph Miller purchased a house in Detroit, Michigan, subject to an existing first mortgage, dated April 17, 1973, held by First Federal of Michigan. The sale price was $26,500.00, and the balance on the mortgage note was approximately $20,900.00.

Following repeated, lengthy lay-offs from his employment, Miller defaulted on the mortgage in 1981. First Federal commenced a foreclosure by advertisement in March 1982, and a sheriff's sale was held on May 14, 1982. First Federal purchased the property for a bid of the balance owing on the mortgage.

On November 2, 1982, before the statutory redemption period expired, Miller filed a Chapter 13 petition and plan. In his plan, Miller proposed to pay the arrearage on the mortgage and to maintain current payments on the note. Miller also moved the bankruptcy court to issue

a stay order tolling the redemption period. The bankruptcy court denied the motion, denied confirmation of the plan, and lifted the automatic stay as to First Federal, allowing the mortgagee to pursue eviction.

Miller appealed these decisions to the district court, and the parties entered into a stipulation to stay proceedings pending appeal. Judge Thornton reversed the bankruptcy court, holding that 11 U.S.C. § 1322(b)(5) permits a Chapter 13 debtor to set aside a foreclosure sale, pay any arrearage, and reinstate the terms of the mortgage when the petition is filed before the redemption period expires.

The parties entered into another stipulation to stay proceedings pending First Federal's appeal of Judge Thornton's decision.

EDWARD J. and MARY L. PIGLOSKI (83-1316)

In May 1981, Edward and Mary Pigloski sought to refinance their house by entering into a loan agreement arranged by Manor Mortgage Company. The house was encumbered by an existing mortgage of $14,500.00, which the mortgagee, Standard Federal Savings & Loan Association, had threatened to foreclose. Following the directions of Manor Mortgage Company, the Pigloskis incorporated themselves and signed a wrap-around mortgage and note to Maxine Wynn. The parties dispute the amount owed on the note, and the Pigloskis claim that it is actually usurious. In any event, the Pigloskis failed to make mortgage payments to Maxine Wynn.

Mrs. Wynn commenced foreclosure by advertisement under Michigan law in October 1981, and a sheriff's sale was held on November 20, 1981.

On April 30, 1982, before the statutory redemption period expired, the Pigloskis filed a Chapter 13 petition and plan. Under their plan, the Pigloskis proposed to pay, over a period of two and one half years, all the

amounts they believed were legally due and owing to Mrs. Wynn. The Pigloskis also filed a motion for a stay order tolling the redemption period. The bankruptcy court eventually held that it had no authority to toll the statutory redemption period.

The Pigloskis appealed the decision to the district court. Judge Boyle held that the automatic stay of 11 U.S.C. § 362(a) does not toll the statutory redemption period and that 11 U.S.C. § 105 does not authorize a bankruptcy court to toll the redemption period. Judge Boyle also held that a foreclosure sale extinguishes the mortgage and, as a result, is not subject to cure under section 1322(b)(5).

II.

11 U.S.C. § 1322(b) outlines the permissible contents of a wage earner plan under Chapter 13 of the Bankruptcy Code. The relevant portions of that section provide:

> (b) Subject to subsections (a) and (c) of this section the plan may—
>
> . . . .
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims;
>
> (3) provide for the curing or waiving of any default;
>
> . . . .
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;
>
> . . . .

The mortgagees do not dispute that subsection (b)(5) permits a Chapter 13 debtor to cure a default on a long-term mortgage on the debtor's principal residence. However, they contend that once the long-term debt has been accelerated, or a foreclosure judgment has been obtained, or a foreclosure sale has occurred, the claim is no longer one "on which the last payment is due after the date on which the final payment under the plan is due" and, therefore, is not subject to cure under subsection (b)(5). Moreover, they argue that allowing the debtor to cure the default and reinstate the terms of the mortgage after any of these events would violate the language of subsection (b)(2), which prohibits modification of the rights of holders of claims "secured only by a security interest in real property that is the debtor's principal residence."

The courts disagree over whether and under what circumstances section 1322(b) allows a cure once a default on a mortgage has triggered acceleration of the debt, a jugment or a sale. The bankruptcy court in *In re Ivory*, 32 Bankr. 788 (Bankr. D. Or. 1983), grouped the differing viewpoints into the following general categories:

> (1) Courts that hold that a debtor may not cure a default once a mortgage debt has been accelerated: *In re Wilson*, 11 B.R. 986 (Bkrtcy.S.D.N.Y.1981); *Matter of LaPaglia*, 8 B.R. 937 (Bkrtcy.E.D.N.Y. 1981); *In re Allen*, 17 B.R. 119, 8 BCD 945 (Bkrtcy. N.D.Ohio 1981).
>
> (2) Courts that hold that a debtor may cure a default where the mortgage debt has been accelerated provided that no foreclosure judgment has been entered: *Percy Wilson Mortgage & Finance Corp.* v. *McCurdy*, 21 B.R. 535 (Bkrtcy.S.D. Ohio W.D.1982); *In re Maiorino*, 15 B.R. 254 (Bkrtcy.D.Conn.1981); *In re Pearson*, 10 B.R. 189 (Bkrtcy.E.D.N.Y.1981).
>
> (3) Courts [that] hold that a debtor may cure a default where a state court judgment of foreclosure has been entered provided that no sale has taken

place: *In re Acevedo*, 26 B.R. 994 (D.E.D.N.Y.1982); *In re James*, 20 B.R. 145, 9 BCD 208 (Bkrtcy.E.D. Mich. 1982); *In re Brantley*, 6 B.R. 178 (Bkrtcy. N.D.Fla. 1980).

(4) Courts that place no express limitation on the debtor's right to cure a default after acceleration: *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982); *In re Sapp*, 11 B.R. 188 (Bkrtcy.S.D.Ohio E.D. 1981); *In re Davis*, 16 B.R. 473 (D.Kan.1981). Or after a judgment has been entered: *In re Young*, 22 B.R. 620 (Bkrtcy.N.D.Ill.E.D.1982); *In re Breuer*, 4 B.R. 499, 6 BCD 136 (Bkrtcy.S.D.N.Y.1980).

(5) Courts that hold that a debtor may cure a default where a foreclosure sale has been held provided that the debtor's right of redemption under state law has not expired: *In re Johnson*, 29 B.R. 104 (Bkrtcy.S.D.Fla.1983); *In re Chambers*, 27 B.R. 687 (Bkrtcy.S.D.Fla.1983); *In re Taylor*, 21 B.R. 179 (Bkrtcy.W.D.Mo.1982); *In re Thompson*, 17 B.R. 748 (Bkrtcy.W.D.Mich.1982).

32 Bankr. at 790. To the fourth group we add the following recent opinions by the Fifth and Seventh Circuits; *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc) (holding that a debtor may cure a default after acceleration, but expressing no limit on the right); *Matter of Clark*, 738 F.2d 869 (7th Cir. 1984) (holding that a debtor may cure a default after a judgment of foreclosure that does no more than judicially confirm the acceleration under state law, but expressing no opinion whether the right to cure survives a sale or a judgment of foreclosure in states where the effect of the judgment is different).

Most courts agree that section 1322(b)(5) allows the debtor to cure a default when the mortgagee has not yet accelerated the debt, *see, e.g., In re Pearson*, 10 Bankr. at 193; *In re Hartford*, 7 Bankr. 914 (Bankr. D. Me. 1981), and that the debtor may not reinstate the mort-

gage if the bankruptcy petition is filed after the state redemption period has expired, *see, e.g., In re Ivory*, 33 Bankr. at 791; *In re Thompson*, 17 Bankr. at 751.

The legislative history of section 1322(b) is ambiguous about the scope of the right afforded the debtor to cure a mortgage default. To encourage consumer debtor rehabilitation rather than liquidation, Congress designed Chapter 13 of the Bankruptcy Code to provide greater relief than was available under the former Bankruptcy Act. H.R. Rep. No. 595, 95th Cong., 1st Sess. 116-17 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6076-78. The House Report further explains the chapter's general purpose:

> The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a percentage of their claims in full settlement. During the repayment period, creditors may not harrass [sic] the debtor or seek to collect their debts. They must receive payments only under the plan. This protection relieves the debtor from indirect and direct pressures from creditors, and enables him to support himself and his dependents while repaying his creditors at the same time.
>
> The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to

> straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

*Id.* at 118.

One of the significant specific changes introduced by Congress in the new legislation was to allow modification of the contract rights of secured creditors under a Chapter 13 plan. H.R. Rep., *supra*, at 124; Bankruptcy Laws Commission's Report, H.R. Doc. 137, pt. 2, 93rd Cong., 1st Sess. 205 (1973). Nevertheless, it is evident upon examining the final language of section 1322(b)(2) that Congress contemplated a different treatment of debts secured only by mortgages on the debtor's principal residence.

One would think that when trying to liberalize the relief to debtors under Chapter 13, Congress would be particularly solicitous of the individual wage earner's ability to save his home. However, it is apparent from the language of section 1322(b) that Congress intended to give a preferred status to certain types of home mortgagees and lienholders, a policy which at first blush would seem at odds with the general thrust of the new act. The question naturally arises: why?

The legislative history says little in terms of political or social philosophy as such. However, it does reveal that the final language of section 1322(b) evolved from earlier language, incorporated in the bill apparently at the behest of representatives of the mortgage market,[1] that would

---

[1] This language appeared in the Senate version of the bill, S. 2266, 95th Cong., 2d Sess. § 1322 (1978), not long after Senate committee hearings at which Edward J. Kulik, representing the Real Estate Division of Massachusetts Mutual Life Insurance Company, testified that Chapter 13, as then proposed, might have the unintended effect of restricting the flow of home mortage money. *See Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the*

have prohibited modification of the rights of all creditors whose claims were wholly secured by mortgages on real property. Although the earlier language did not survive,

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*Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 707, 714-15 (1977) (statement of Edward J. Kulik, Senior Vice-President, Real Estate Division, Massachusetts Mutual Life Ins. Co.). Specifically, Mr. Kulik was concerned that provisions (1) allowing modification of rights of holders of secured claims and (2) protecting guarantors and codebtors as well as the Chapter 13 debtor might have this effect. He urged:

> Serious consideration should be given to modifying both bills so that, at the least: One, a mortgage on real property other than investment property may not be modified, and two, providing that the stay of actions against a guarantor or other codebtor is applicable only to guarantees executed after the effective date of the new legislation.

*Id.* at 714.

In response to Senator DeConcini's comments questioning the severity of the problem, Robert E. O'Malley, Mr. Kulik's counsel, stated:

> With respect to the savings and loans, in particular, and the future prospects for loans to individuals under the proposed bills, there is really only one basic problem. That is, the provision in both bills that provides for modification of the rights of the secured creditor on residential mortgages, a provision that is not contained in present law.
>
> I think the answer to your question is that, of course, savings and loans will continue to make loans to individual homeowners, but they will tend to be, I believe, extraordinarily conservative and more conservative than they are now in the flow of credit.
>
> It seems to me they will have to recognize that there is an additional business risk presented by either or both of these two bills if the Congress enacts chapter XIII in the form proposed, thus providing for the possibility of modification of the rights of the secured creditor in the residential mortgage area.
>
> I think the answer is that they will be much more conservative than they have been in the past.

*Id.* at 715 (statement of Robert E. O'Malley, Attorney, Covington & Burling).

the statute as finally enacted by Congress clearly evidences a concern with the possible effects the new bankruptcy act might have upon the market for homes. If any other policy objective of Congress was adequate to compete against the objective of protecting wage earners generally, it was a policy to encourage the increased production of homes and to encourage private individual ownership of homes as a traditional and important value in American life. Congress had to face the reality that in a relatively free society, market forces and the profit motive play a vital role in determining how investment capital will be employed. Every protection Congress might grant a homeowner at the expense of the holders of security interests on those homes would decrease the attractiveness of home mortgages as investment opportunities. And as home mortgages decrease in attractiveness, the pool of money available for new home construction and finance shrinks.

On the other hand, Congress was determined not to depart too far from its expressed policy of making wage earner plans more attractive to debtors, especially as an alterantive to full bankruptcy proceedings under Chapter 7. Therefore, the preferred status granted some creditors under section 1322(b)(2) was limited to holders of claims secured *only* by a security interest in the debtor's principal residence. No preferential treatment was given debts secured by property in addition to the debtor's principal residence. Such debts normally are incurred to make consumer purchases unrelated to the home or to enable the debtor to engage in some form of business adventure. In such circumstances the home is mortgaged not for its own sake, but for other purposes, and often is only one of several forms of security given. In a consumer purchase the creditor may also take a security interest in the goods purchased, or in a business transaction, the value of the home may be an insufficient security and, therefore, form only a part of the security package. Congress granted no extra protection for holders of these

types of secured claims, presumably because any impact the bankruptcy laws might have upon them would not seriously affect the money market for home construction or purchase.

Furthermore, in sections 1322(b)(3) and (5), which permit the debtor's Chapter 13 plan to cure defaults, Congress provided no special exceptions for creditors whose claims are secured by a security interest in the debtor's residence. Congress expressly provided that subsection (b)(5), which allows the debtor to cure any default on mortgages that extended beyond the life of the Chapter 13 plan, is to operate "notwithstanding paragraph (2) of this subsection." [2]

We wish Congress had spoken its specific intent more clearly with respect to cases involving acceleration, judgments, or sales. It did not but instead saw fit to speak only in broad terms.[3] As is so obvious from the broad range of the cited lower court decisions, any particular result often reflects the value judgment of the particular court as to which of the two competing values should predominate, or at least which is more attractive under the specific facts of the case at hand. All courts agree that at some point in the foreclosure process, the right to cure

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[2] The Senate added the "notwithstanding paragraph (2)" language to subsection (b)(5) when it amended subsection (b)(2) to prohibit modification of the rights of creditors whose claims are secured only by a security interest in the debor's principal residence.

There is some disagreement about whether the "notwithstanding" clause was necessary. Compare *Grubbs* v. *Houston First American Savings Association*, 730 F.2d 236, 246 (5th Cir. 1984), with *In re Williams*, 11 Bankr. 504, 506 (Bankr. S.D. Tex. 1981). Whether the clause was necessary or not, it does indicate that Congress did not want the language of subsection (b)(2) to interfere with a debtor's right to cure default on a long-term mortgage under subsection (b)(5).

[3] One justification may be found in the fact that state laws, practices and even terminology vary extensively. Any effort to be more specific in one context may only brew uncertainty elsewhere.

a default is irretrievably lost; however, the statute itself provides no clear cut-off point except that which the courts may see fit to create. The closer that point of finality is to the beginning of the process, the greater is the protection accorded the mortgage holder, and, hence, the more attractive the home mortgage becomes as an investment. Conversely, the further down the line the court can reach to protect the debtor from the consequences of his default, the better the debtor's needs are met by the Chapter 13 proceedings, and the more attractive those proceedings become to such debtors.[4]

We despair of finding any clear-cut statutory language or legislative history that points unerringly to a construction of the statute that is free from challenge. Each of the cases and each result reached therein is subject to some objection either in theory or in practice. The result we reach here is, therefore, primarily a pragmatic one—one that we believe not only works the least violence to the competing concerns evident in the language of the statute but also one that is most readily capable of use. The event we choose as the cut-off date of the statutory right to cure defaults is the sale of the mortgaged premises. We pick this in preference to a number of other potential points in the progress of events ranging from the date of first default to the day the redemption period expires following sale. We do so for the following reasons, which admittedly may form a large target for criticism:

(a) The language of the statute is, to us, plainly a compromise, as we have earlier mentioned. Picking a date between the two extremes, is likewise a compromise of sorts.

---

[4] We think that the other provisions of section 1322(b) indirectly assist the debtor in his quest to salvage his home. By modifying the terms of some debts and curing defaults generally over a longer period of time without incurring more adverse consequences, a Chapter 13 plan may free up additional money to aid the debtor in curing a default on his home mortgage.

(b) The sale of the mortgaged property is an event that all forms of foreclosure, however, denominated, seem to have in common. Whether foreclosure is by judicial proceeding or by advertisement, and regardless of when original acceleration is deemed to have occurred, the date of sale is a measurable, identifiable event of importance in the relationship of the parties. It is at the heart of realization of the security.

(c) Although the purchaser at the sale is frequently the security holder itself, the sale introduces a new element—the change of ownership and, hence, the change of expectations—into the relationship which previously existed.

(d) The foreclosure sale normally comes only after considerable notice giving the debtor opportunity to take action by seeking alternative financing or by negotiating to cure the default or by taking advantage of the benefits of Chapter 13. Therefore, setting the date of sale as the cut-off point avoids most of what some courts have described as the "unseemly race to the courthouse." Concededly no scheme can avoid that possibility altogether, but the time and notice requirements incident to most sales at least provide breathing room and should deter precipitate action that might be expected if the cut-off date were measured by the fact of notice of acceleration or the fact of filing suit.

(e) Any earlier date meets with the complaint that the rights conferred by the statute upon debtors to cure defaults have been frustrated.

(f) Any later date meets with the objection that it largely obliterates the protection Congress intended for mortgagees of private homes as distinguished from other secured lenders.

(g) Any later date also brings with it the very serious danger that bidding at the sale itself, which should be arranged so as to yield the most attractive price, will be chilled; potential bidders may be discouraged if they cannot ascertain when, if ever, their interest will become finalized.

In so ruling we avoid any effort to analyze the transaction in terms of state property law. Modern practice varies so much from state to state that any effort to satisfy the existing concepts in one state may only create confusion in the next. Thus, in construing this federal statute, we think it unnecessary to justify our construction by holding that the sale "extinguishes" or "satisfies" the mortgage or the lien, or that the mortgage is somehow "merged" in the judgment or in the deed of sale under state law.

III.

A. Section 362(a)—Automatic Stay

The debtors in *Miller* and *Pigloski* argue that the automatic stay provisions of 11 U.S.C. § 362(a) operate to toll the running of the statutory period for redeeming real estate sold at a foreclosure sale. Section 362(a) provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have

> been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> . . . .

An oft-quoted excerpt from the legislative history of section 362(a) indicates the provision's major purposes:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which

> all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6296-97.

The district courts and bankruptcy courts disagree concerning whether the automatic stay provisions of section 362(a) toll state statutory foreclosure redemption periods. One line of cases has held that the limited automatic extension of time available under 11 U.S.C. § 108 (b)[5] precludes relief under section 362(a). Section 108 (b) provides:

> (b) Except as provided in subsection (a) of this section, if applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
>
> (2) 60 days after the order for relief.[6]

In *Bank of Commonwealth* v. *Bevan*, 13 Bankr. 989 (E.D. Mich. 1981), the mortgagor filed a petition for

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[5] Neither Miller nor the Pigloskis have claimed any benefit from the provisions of section 108(b).

[6] In a voluntary case, the entry of the order for relief is the filing of the petition commencing the case. S. Rep. No. 598, 95th Cong., 1st Sess. 28 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5814.

reorganization under Chapter 11 of the Bankruptcy Code following a foreclosure sale of his home. The bankruptcy court had entered an order pursuant to section 362(a), indefinitely extending the statutory redemption period. In reviewing the bankruptcy court's order, the district court noted that "the language of § 362(a) fails to explicitly address the running of time periods," *id.* at 992, while section 108 explicitly grants the trustee additional time in which to perform acts such as redemption. Reading the two sections together, the court held that the automatic stay provisions of section 362(a) do not override the extension of time provision in section 108(b). The court reasoned:

> An interpretation of § 362(a) as an indefinite stay of the statutory period of redemption would render § 108(b) superfluous. If § 362(a) automatically stays the running of the statutory right to redeem until the stay is lifted pursuant to § 362(c) or (d), the pertinent time allotments of § 108(b) are completely extraneous as statutory time periods designed to control the trustee's activity. Moreover, if § 362(a) is interpreted to provide for the automatic stay of time periods for an indefinite amount of time, then subsections (a) and (b) of § 108, which define minimum and maximum time periods for the trustee to act, directly conflict with § 362(a).

*Id.* at 994. The court concluded that "where one section of the Bankruptcy Code explicitly governs an issue, another section should not be interpreted to cause an irreconcilable conflict." [7] *Id.*

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[7] Although it determined that the bankruptcy court incorrectly cited section 362(a) as the basis for its order tolling the redemption period, the district court affirmed the bankruptcy court's action, holding that the stay was a permissible exercise of the broad grant of discretionary authority embodied in section 105. 13 Bankr. at 996. That aspect of the *Bevan* opinion is discussed at Part III.B., *post*, at 24.

Several courts have agreed with the *Bevan* court's interpretation of sections 108(b) and 362(a). *See, e.g., Johnson* v. *First National Bank*, 719 F.2d 270, 278 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984); *In re Cucumber Creek Development, Inc.*, 33 Bankr. 820 (D. Colo. 1983); *In re Martinson*, 26 Bankr. 648 (D. N.D. 1983); *Matter of Markee*, 31 Bankr. 429 (Bankr. D. Idaho 1983); *In re Construction Leasing & Investment Corp.*, 20 Bankr. 546 (Bankr. M.D. Fla. 1982); *In re Murphy*, 22 Bankr. 663 (Bankr. D. Colo. 1982).

In a recent case, the Bankruptcy Court for the Western District of Michigan considered whether the automatic stay of section 362(a) tolls the statutory redemption period in the context of Chapter 13. *In re Wallace*, 33 Bankr. 29 (Bankr. W.D. Mich. 1983). The debtor in *Wallace* had filed her Chapter 13 petition and plan following the foreclosure sale of her residence. In her plan, which was confirmed by the bankruptcy court, the debtor had proposed to make current payments on the mortgage on her residence outside the plan and to cure the default by making payments on the arrearage within the plan. When the debtor failed to make her payments under the plan, the bankruptcy case was dismissed. Approximately a month after the dismissal, the mortgagee notified the debtor that the redemption period had expired and asked her to vacate the house. The debtor refused, and the mortgagee sought a declaratory judgment that it was entitled to immediate possession of the property. The debtor argued, *inter alia*, that the automatic stay of section 362(a) had tolled the redemption period until the stay terminated upon dismissal of the case. The bankruptcy judge noted his earlier decision in *In re Thompson*, 17 Bankr. 748 (Bankr. W.D. Mich. 1982), that a Chapter 13 debtor could cure an arrearage and reinstate his mortgage even though a foreclosure sale had occurred before the petition was filed. However, he held that the right to cure and reinstate a mortgage was not based on

any tolling of the redemption period. The bankruptcy judge concluded:

> To adopt the tolling theory as proposed by Wallace could lead to results in Chapter 13 cases never intended by Congress. Thus, following the cases cited by her, the tolling period would cease when the discharge was granted in a completed case and thereafter when the redemption time had expired, even though a debtor were current in payments, the foreclosure sale would be final.
>
> Therefore, I would hold that upon filing the petition, the automatic stay would only prevent action to recover possession and upon completion of the plan, the default would be cured and the position of the debtor and creditor would be the same as though the foreclosure had never occurred. If, however, the plan is not completed on dismissal, the mortgagee would have the same rights that he would have had if no Chapter 13 petition had been filed.

33 Bankr. at 32.

Another line of cases, anchored by *In re Jenkins*, 19 Bankr. 105 (D. Colo. 1982), and *In re Johnson*, 8 Bankr. 371 (Bankr. D. Minn. 1981), takes the position that the automatic stay provisions of section 362(a) should be liberally construed to suspend the running of a statutory period of redemption. In *Johnson* an involuntary petition under Chapter 7 was filed against the mortgagor after three pieces of his real estate had been sold at a foreclosure sale. Following a hearing on a motion to prevent the running and termination of the redemption period, the bankruptcy court held that the automatic stay of section 362(a) operated to toll the redemption period. Because the legislative history of section 362(a) indicated that Congress intended to alter the scope of protection afforded by the stay provisions under the old Bankruptcy

Act,[8] the court reasoned that the scope of section 362(a) could not be determined by reliance on cases decided under old law. Finding that the provisions of section 362(a) should be construed liberally "to give full protection to the debtor and creditors," 8 Bankr. at 374, the court held that the redemption period was tolled by three separate subsections of section 362(a): subsection (a)(2), which stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case"; subsection (a)(3), which stays "any act to obtain possession of property of the estate or of property from the estate"; and subsection (a)(4), which stays "any act to create, perfect, or enforce any lien against property of the estate." The court found no conflict between its interpretation of section 362(a) and the language of section 108(b). It held that the specific language of section 108(b) allowing the trustee time to act before "the end of such period, *including any suspension of such period occurring on or after the commencement of the case*," (emphasis added) expressly recognizes that the running of time may be suspended under section 362(a). Therefore, the *Johnson* court reasoned that section 108(b) did not govern the issue.

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[8] The court relied specifically on this statement from House Report No. 595:

> The provisions in the current Bankruptcy Act for a stay of actions against the debtor and his property upon the commencement of a bankruptcy, reorganization, or repayment plan case are inadequate . . . The stay is an important aspect of bankruptcy protection, and is an element of the debtor's fresh start. . . .
>
> . . . The automatic stay in H.R. 8200 differs in some ways from the stays provided by the Rules of Bankruptcy Procedure today. The new stay expands coverage in some areas, reduces it in others, and clarifies many uncertain aspects of the current provisions.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 174 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6135 (footnotes omitted).

In *Jenkins*, the district judge did not discuss the relationship between section 108 and section 362; however, he did hold that in the context of a Chapter 11 proceeding, the automatic stay provisions of section 362(a)(1) and (a)(4) tolled the Colorado redemption period and prohibited the purchaser at the foreclosure sale from applying for a public trustee's deed on the property involved.

The district judge in *Jenkins* has subsequently altered his position on the automatic stay issue. In *In re Cucumber Creek Development, Inc.*, 33 Bankr. 820 (D. Colo. 1983), he specifically considered whether the automatic stay provisions of section 362 could apply to toll a statutory redemption period in the face of the more specific provisions of section 108:

> I have had an opportunity in the past to address this question in a slightly different context. *In Re Jenkins*, 19 B.R. 105 (D.C. Colo. 1982). There, I ruled that § 362(a)'s automatic stay tolled the state redemption period to preserve "those property rights which I have found to be possessed by the debtor at the time of filing." 19 B.R. at 110. In *Jenkins*, however, I did not discuss or consider the applicability of 11 U.S.C. § 108 to such a case. Given an opportunity to consider the question here and to review the body of case law which has developed, I now conclude that § 362(a) is inapplicable, and that state redemptive rights may be preserved and extended only to the extent provided by § 108.

33 Bankr. at 821.

Both *Johnson* and *Jenkins* were expressly disapproved by the only court of appeals to consider whether section 362(a) might apply to toll a statutory redemption period. *Johnson* v. *First National Bank*, 719 F.2d 270, 275 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984). In *First National Bank*, the mortgagors filed a joint petition for reorganization under Chapter 11 approximately three

weeks before the expiration of the redemption period on their property that been sold at a foreclosure sale. Relying upon 11 U.S.C. § 105, the bankruptcy court enjoined the mortgagee from taking any further action to foreclose the property and ordered that the running of the statutory redemption period be stayed until further order or until the bankruptcy cases concerning the property were closed. The district court affirmed, and the mortgagee appealed. On appeal the debtors argued that although the district court relied solely upon section 105(a), the provisions of section 362(a) and section 108(b) also supported the bankruptcy court's order. With respect to section 362(a), the Eighth Circuit accepted the reasoning in *Bank of Commonwealth* v. *Bevan* and expressly rejected the position taken in *In re Jenkins* and *In re Johnson*. The court found that the "clear majority" of cases decided under various automatic stay provisions of the old Bankruptcy Act held that the filing of a petition in bankruptcy did not toll or extend the running of a statutory period of redemption. Finding no clear manifestation of congressional intent to change the law on the issue, the court assumed that the newly-enacted statute, whose language was substantially identical to that of the previous statutes, was harmonious with existing law and its judicial construction. Moreover, the court found that the presence of section 108(b) in the Code supported its determination that section 362(a) did not apply to toll the Minnesota statutory redemption period.

We find ourselves in agreement with the reasoning of the Eighth Circuit in *First National Bank* and are reinforced in our conclusion by the belief that inter-circuit conflicts should be avoided wherever it is possible to do so in good faith and in reason.

B. Section 105(a)

The debtors in *Miller* and *Pigloski* also contend that 11 U.S.C. § 105(a) empowers bankruptcy courts to issue

separate stay orders tolling statutory redemption periods. That section provides:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The minority position on this issue is set forth in *Bank of Commonwealth* v. *Bevan*, 13 Bankr. 989 (E.D. Mich. 1981). *See also Bank of Ravenwood* v. *Patzold*, 27 Bankr. 542 (N.D. Ill. 1982). After holding that section 362(a) did not apply, the district court in *Bevan* upheld the bankruptcy court's order tolling the statutory redemption period as a permissible exercise of authority under section 105. Relying on two cases decided under the Bankruptcy Act, the court found that the broad grant of power in section 105 authorized a bankruptcy judge, in appropriate situations, to grant the trustee "a greater period of time in which to act than § 108 initially authorizes." 13 Bankr. at 996.

Several courts have taken a contrary position, holding that section 105(a) may not be invoked to toll or suspend the running of a statutory redemption period absent fraud, mistake, accident, or erroneous conduct on the part of the foreclosing officer. *Johnson* v. *First National Bank*, 719 F.2d at 274; *In re Martinson*, 26 Bankr. 648, 654 (D. N.D. 1983); *Matter of Markee*, 31 Bankr. 429, 432 (Bankr. D. Idaho 1983); *In re James*, 20 Bankr. 145, 150-51 (Bankr. E.D. Mich. 1982); *In re Headley*, 13 Bankr. 295, 297-98 (Bankr. D. Colo. 1981). In *First National Bank*, the Eighth Circuit reversed a district court judgment that had affirmed a bankruptcy court order entered under section 105(a) tolling the Minnesota redemption period. The court found that the equitable powers granted a bankruptcy court by section 105(a) are quite broad, but not unlimited. Specifically, the court found that, "absent a specific grant of authority from Congress or exceptional circumstances, a bank-

ruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law." 719 F.2d at 274. The court concluded that to allow a bankruptcy court, as a matter of course, to suspend the running of a statutory period of redemption under section 105(a) would enlarge the debtor's property rights "beyond those specifically set forth by the Minnesota legislature and by Congress in § 108(b)." *Id.* The Eighth Circuit was further persuaded by the fact that there was no claim of wrongdoing that adversely affected the debtor's ability to redeem the property within the statutory period:

> "[E]quity is available to protect property rights of the innocent debtor from the wrongful acts of other persons; however, equity does not extend to situations in which the debtor is simply unable to make the required payment within the prescribed time."

*Id.* at 275 (quoting *In re Headley*, 13 Bankr. 295, 297 (Bankr. D. Colo. 1981)).

The bankruptcy court in *In re James*, 20 Bankr. 145 (Bankr. E.D. Mich. 1982), offered another reason for not interpreting, section 105(a) to permit a bankruptcy court to toll state redemption periods as a matter of course. The court found it "clear" that section 105(a) and its predecessor, section 2(a)(15) of the Bankruptcy Act, were intended to affect parties' actions rather than state statutes:

> "The chief test under . . . § 2(a)(15) appeared to be whether or not the proceeding in the nonbankruptcy court sought to be enjoined interfered with the possession or custody of the bankruptcy court or unduly impeded or embarrassed the court in its administration under the Act."

20 Bankr. at 149-50 (quoting 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed.)). Absent some compelling justification, the court declined to use its equitable powers to

interfere with state law by extending the redemption period.

Once again we are persuaded by the reasoning in *First National Bank*, and we note that the trend in the laws seems to be away from allowing bankruptcy courts to issue orders tolling statutory redemption periods under authority of section 105(a). We also observe that the cases construing section 105(a) to confer no power to toll redemption periods absent exceptional circumstances appear to be more carefully reasoned than those holding to the contrary.

IV.

The debtors in each of these appeals have raised additional separate issues which we now address.

A. The Farm Property Claim.

Our decision on the principal issue in this appeal likely will moot the question whether the residence of the Glenns should be treated separately from the fifty acres of farmland upon which it is located because the Glenns will be able to pursue their Chapter 13 plan as they propose. However, in the interest of completeness we address it briefly.

The Glenns' argument rests on the language of section 1322(b)(2). According to that section a plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence . . .*" (emphasis added). The Glenns argue that since the creditors have a security interest in all of the land the Glenns own, including the fifty acres of farmland surrounding the house, the creditors do not have a claim secured only by real property that is the debtor's principal residence. The Glenns maintain, in other words, that the fifty acres of land on which their house is located are not part of their principal residence.

The only case we have found to address this issue is *In re Ballard*, 4 Bankr. 271 (Bankr. E.D. Va. 1980). After noting that neither of the debtors was engaged in farming and that the debtors received only $40 a month of income from the farm, the court in *Ballard* said that "in the absence of a showing that the Debtors clearly use the farm for any principal purpose other than their residence, [this court] must consider the entire . . . property as their principal residence." *Id.* at 276.

This reasoning is even more persuasive here. It is undisputed that the Glenns do not use the fifty acres for any purpose other than as their principal residence. If the Glenns do not in fact put the land to any other use, it is difficult to see why the land should be found to be anything but a part of their residence for the purposes of Chapter 13.

B. Redemption Under the Chapter 13 Plan

The debtors in *Pigloski* claim that even if they are not allowed to reinstate the terms of their mortgage under 11 U.S.C. § 1322(b)(5), they are permitted, under section 1322(b)(3) to spread payment of the redemption price over the entire length of their Chapter 13 plan. The Pigloskis cite *In re Kokkinis*, 22 Bankr. 353 (Bankr. N.D. Ill. 1982), to support this proposition.

In *Kokkinis* the mortgagors filed their Chapter 13 petition after their residence had been sold at a foreclosure sale and one day before the statutory redemption period expired. The debtors proposed to pay both the arrearage and the entire remaining balance owed to the mortgagee over the life of their plan. The primary issue was whether the provisions of section 1322(b) allowed the debtors to cure default after pre-petition acceleration of the mortgage debt. The court held that they did. The court distinguished two cases in which the debtors had been precluded from curing arrearages following foreclosure sales because the debtors in those cases wanted

to reinstate the original payment plans under mortgages while the debtors in *Kokkinis* proposed to pay off the entire debt during the life of their plan.

Although it is possible in theory, to hold that a Chapter 13 debtor is entitled to pay the redemption amount over the life of his plan and also to hold that the statutory redemption period is not tolled by the bankruptcy proceedings,[9] the practical effect of allowing the debtor to pay the redemption amount over an extended period would in many respects be the same as a suspension of the redemption period. Furthermore, most of the considerations that cut against allowing the debtor to reinstate the mortgage terms after a foreclosure sale also argue against allowing the debtor to pay off the redemption amount over the life of the plan. We, therefore, decline to accept this view.

C. Preferential Transfer Under 11 U.S.C. § 547(b)

As an alternative basis for affirming the district court in his case, the debtor in *Miller* argues that the expiration of the redemption period following a foreclosure sale would constitute a preferential transfer that may be avoided under 11 U.S.C. § 547(b). The mortgagee in *Miller* argues that this is a new issue not raised or briefed in the lower courts and that it ought not to be decided without a full opportunity for briefing and litigation in the lower courts. The mortgagee also argues that the debtor violated court rules by raising an issue in his appellee brief when he had not given notice that the issue would be raised before the briefs were written.

This is a novel issue at best and one which was neither raised nor briefed in the lower courts. It implicates en-

[9] See *In re Wallace*, 33 Bankr. 29 (Bankr. W.D. Mich. 1983), in which the bankruptcy judge rejected a tolling theory even though he had held in an earlier case that section 1322(b) allows a Chapter 13 debtor to cure a default and reinstate the terms of a mortgage after a foreclosure sale has occurred.

tirely new provisions of the Bankruptcy Code and factual issues which were neither developed nor otherwise addressed in that context. It would be entirely inappropriate for us to consider that issue in this appeal. *Bannert* v. *American Can Company*, 525 F.2d 104, 111 (6th Cir. 1975).

V.

In summary, we hold that under 11 U.S.C. § 1322(b) a Chapter 13 debtor may cure a default on a mortage on his principal residence even when the debt has been accelerated and a judgment of foreclosure has been entered provided that no foreclosure sale has taken place. Once the property has been sold, the right to cure the default and reinstate the terms of the mortgage under section 1322(b) ceases. We also hold that the automatic stay provisions of 11 U.S.C. § 362(a) do not toll or extend the running of state statutory periods of redemption following foreclosure sales. Moreover, 11 U.S.C. § 105(a) does not empower the courts to issue separate orders tolling statutory redemption periods absent exceptional circumstances such as fraud, mistake, accident, or erroneous conduct. Finally, we hold that section 1322 (b)(3) does not permit debtors to spread payment of redemption amounts over the entire life of their Chapter 13 plans.

Applying the foregoing principles to the specific cases on appeal, we reach the following dispositions:

GLENN (82-3821). While the mortgagee had succeeded in obtaining a judgment of foreclosure, sale of the premises had not occurred at the time the Chapter 13 petition was filed. Accordingly, the judgment of the bankruptcy court overruling the bank's objections and confirming the plan of the debtors is AFFIRMED.

MILLER (83-1585). Because the sheriff's sale had already been held before the Chapter 13 petition was filed, the bankruptcy court was correct in lifting the auto-

matic stay as to First Federal. Therefore, the judgment of the district court is VACATED and we REMAND to the district court with directions to remand to the bankruptcy court for reinstatement of the order from which appeal was taken to the district court and for further proceedings consistent with this opinion.

PIGLOSKI (83-1316). As in *Miller*, the sheriff's sale in this case was held before the debtors filed their Chapter 13 petition. District Judge Boyle was, therefore, correct in ruling that the automatic stay provisions of 11 U.S.C. § 362(a) did not toll the statutory redemption period and in holding that, following the foreclosure sale, the mortgage default was not subject to cure under section 1322 (b)(5) apart from paying the redemption price within the period prescribed by state law. Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 83-1585

IN RE: RALPH MILLER,
*Debtor.*

RALPH MILLER,
*Plaintiff-Appellee,*
v.

FIRST FEDERAL OF MICHIGAN,
*Defendant-Appellant.*

---

[Filed Jun. 3, 1985]

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Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 83-1316

EDWARD J. PIGLOSKI and MARY L.PIGLOSKI,
*Plaintiffs-Appellants,*

v.

MAXINE WYNN and MANOR MORTGAGE COMPANY,
*Defendants-Appellees*

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[Filed Jun. 3, 1985]

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Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 83-1585

IN RE: RALPH MILLER,
*Debtor.*

FIRST FEDERAL OF MICHIGAN,
*Appellant,*

v.

RALPH HENRY MILLER,
*Appellee.*

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[Filed Apr. 16, 1985]

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Before: ENGEL and KRUPANSKY, Circuit Judges, and WEICK, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded to the said district court with directions to remand to the bankruptcy court for reinstatement of the order from which appeal

was taken to the district court and for further proceedings consistent with this opinion.

It is further ordered that Appellant recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JohnP. Hehman
JOHN P. HEHMAN
Clerk

Issued as Mandate: June 11, 1985

COSTS: None

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Bankruptcy No. 82-06216

Consolidated Civil Nos. 82-74539 - 83-0335

IN RE: RALPH MILLER

RALPH MILLER,
*Debtor-Appellant,*

—v—

FIRST FEDERAL OF MICHIGAN,
*Appellee.*

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## OPINION

These cases are before the Court on appeal from an Order Denying a Stay Tolling the State Redemption Period entered by the Bankruptcy Judge on November 9, 1982, and an Order Denying Confirmation of the Debtor's Chapter 13 Plan entered January 24, 1983. The November 9, 1982 Order denied extension of a six-month statutory redemption period that began to run following a sheriff's foreclosure sale of the residential property of the debtor on May 14, 1982. When the redemption period ran on November 14, 1982, this then became the basis for the denial of the debtor's Chapter 13 plan. Debtor appellant contends on appeal that the Bankruptcy Reform Act of 1978 permits a debtor to cure a default, even after foreclosure, so long as the default involves property of the estate subject to the Bankruptcy

Court's jurisdiction, and, that the redemption period following a foreclosure sale under Michigan law may be tolled pursuant to provisions of the Bankruptcy Reform Act of 1978.[1]

The undisputed facts as set forth by the debtor-appellant are:

> On or about August 5, 1980, the Debtor, RALPH MILLER, purchased a house and lot located at 18645 Teppert, in the City of Detroit, State of Michigan, subject to an existing first mortgage, dated April 17, 1973, held by First Federal of Michigan. The sales price was $26,500.00, and the balance on the mortgage note was approximately $20,900.00.
>
> Primarily due to repeated and lengthy lay-offs from his employment with Chrysler Corporation, the Debtor defaulted on this mortage in late 1981. He was thereafter unable to cure the default under the terms mandated by the mortgagee. A foreclosure by advertisement was commenced in March, 1982. The sheriff's sale was held on May 14, 1982. First Federal of Michigan was the only bidder at the sale; their bid was the balance owing on the mortgage.
>
> Prior to the expiration of the redemption period, the Debtor, on November 2, 1982, filed a Chapter 13 Petition and Plan. The Plan proposed by the Debtor would provide payments to the mortgage company to cure the default and current monthly mortgage payments.
>
> Immediately upon filing the Chapter 13 Petition, Debtor filed a Motion for Stay Order Tolling Redemption Period and Restraining Order, in which he requested the Bankruptcy Court to issue a Stay

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[1] For clarification, this Court follows the now common practice of referring to the Bankruptcy Act of 1898 as the "Act" and the Bankruptcy Reform Act of 1978 as the "Code".

Order Tolling the Redemption Period under *Bank of the Commonwealth v. Bevan*, 13 Bankr. Rptr. 989 (E.D. Mich. 1981). The Bankruptcy Court heard and denied the Motion on November 9, 1982. The Court adopted the opinion set forth in, *In re James*, 20 Bankr. Rptr. 145 (Bankr. E.D. Mich. 1982), holding that § 105 does not authorize a bankruptcy court to toll a state statutory period of redemption.

At the Confirmation Hearing held on January 11, 1983, the Court also denied confirmation of the Debtor's Chapter 13 Plan. The Court further ordered that the automatic stay as to First Federal of Michigan was lifted, allowing the mortgagee to pursue eviction. Finally the Court ruled that 11 U.S.C. § 362 did not toll the redemption period and the debtor could not cure a default after a sheriff's sale.

Upon stipulation of the parties, this Court entered an Order on December 21, 1982, Staying Proceedings pending this appeal for which oral arguments were heard March 2, 1983.

The residential property involved in this action constitutes "property of the estate" and is therefore within the jurisdiction of the Bankruptcy Court. 11 U.S.C. § 541; 4 Collier on Bankruptcy ¶ 541.07[1] (15th Ed. 1980). This is so because the debtor's interest in real property subsequent to a foreclosure sale includes the right of redemption which allows the debtor a statutorily prescribed period of time to "redeem" the property from the purchaser at the sale. MCLA §§ 600.3101 *et. seq.*, 600.3201 *et. seq.*; MSA §§ 27A.3101 *et seq.*, 27A.3201 *et seq.* This interest of the debtor includes retention of legal title in the premises by the mortgagor until the expiration of the period of redemption. *Bankers Trust Company of Detroit v. Rose*, 322 Mich. 256 (1948).

While the nature and extent of the debtor's interest in real property is determined by application of state law,

the Bankruptcy Code defines those interests in property which become the "property of the estate" and hence within the Bankruptcy Court's jurisdiction. As the period of redemption had not expired at the time the Chapter 13 petition was filed in this case, the right to redeem became property of the estate by operation of 11 U.S.C. 541 [2] as of the time of filing.

The first issue this Court is confronted with is whether an acclerated mortgage debt falls within § 1332(b)(5) of the Bankruptcy Code which allows a debtor to pay off a mortgage arrearage (cure a default), during the life of the debtor's reorganization plan while maintaining current payments.

Section 1322(b) reads in pertinent part:

> (b) Subject to subsections (a) and (c) of this Section, the [Chapter 13] Plan may—
>
> * * * *
>
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims;
>
> * * * *
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on *which the last payment is due after the date on which the final payment under the plan is due* . . .

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[2] Section 541 of the Bankruptcy Code defines "property of the estate" as follows:

> (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located:
>
> (1) except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The analysis which has made § 1322(b) unavailable to debtors in the position of Ralph Miller [3] is that a default cannot be cured under this section because the last payment of the accelerated mortgage is due before the time in which the final payment is due under the reorganization plan. Bankruptcy Courts have therefore held that an accelerated mortgage debt is not within § 1322(b)(5). *In re Paglia*, 8 Bankr. 937 (BCED N.Y. 1981); *In re Butchman*, 4 Bankr. 379 (BCSD N.Y. 1980); *In re Rutterbush*, Civ. Ac. No. 81-40270 (decided September 24, 1982, E.D. Mich.) (Newblatt J.)

The Court of Appeals of the Second Circuit has addressed the issue within the context of accelerated mortgages without specifically addressing a post-foreclosure sale situation. *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982) However, in *Taddeo* the Court rejected the mortgagee's claim that the debtors could not use § 1322(b)(5) to cure their default and maintain payments in that (b)(5) applies only to claims whose last payment is due after that under the plan, by holding that the concept of "cure" in § 1322(b)(5) contains the power to deaccelerate. 685 F.2d at 26, 28. As to the mortgagee's contention that to allow a debtor to cure the default as proposed would violate prohibitions against modification of home mortgages set forth in § 1322(b)(2), the Court pointed out that in light of legislative history and legislative purpose, the "notwithstanding paragraph (2)" clause was added to § 1322(b)(5) to emphasize that defaults in mortgages could be cured notwithstanding § 1322(b)(2). *Id* at 27, (citing 124 Cong. Rec. H 11, 1106 (Sept. 28, 1978); S.17, 423 (Oct. 6, 1978)). The Court pointed out, however, that the clause was not neccessary as the Senate protected home mortgages from *modification* in its bill S.2266, 95th Cong. 2d. Sess., but evinced no intent to protect these mortgages from *cure*.

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[3] The debtor Ralph Miller defaulted on mortgage containing a standard acceleration clause.

*Id.* at 27-28. The Court further noted that the few cases under the successor Chapter XIII of the old Bankruptcy Act distinguish modifying a claim from maintaining payments thereon, and indicate that curing a default and maintaining payments on a claim did not modify a plan. Id. at 28, (citing *Hallenbeck v. Penn Mutual Life Insurance Co.* 323 F.2d 566 (4th Cir. 1963)).

Two Bankruptcy Courts in Michigan have reached contrary results in addressing the issue of the ability to cure a default under § 1322(b)(5). In *In re James*, 20 Bankr. 145 (BCED Mich. 1982), Judge Graves stated that "because a foreclosure sale under Michigan law extinguishes the mortgage and transfers legal title to the purchaser", [citing, *Ledyard v. Phillips*, 47 Mich. 305 (1882)[4]], "the mortgagor is left with its statutory right to redeem from the sale within six months thereof pursuant to MCLA § 600.3140." 20 Bankr. at 149. Therefore, because payment can no longer occur in accordance with the due date on the mortgage, but, at the most, can only be made within six months from the date of foreclosure, Judge Graves concluded that, "by its own terms § 1322(b)(5) is inapplicable" since the statute requires fulfillment of the terms of the reorganization plan prior to the date of the final payment under the mortgage. *Id.* Without further analysis of the treatment of secured debts under the Bankruptcy Act of 1898, or legislative history and purpose, or the intent of Congres, Judge Graves eliminated the remedies contained in § 1322(b)(5) for debtors whose mortgages had been accelerated and were the subject of foreclosure sales.

In *In re Thompson*, 17 Bankr. 748 (BCWD Mich. 1982), the Court accurately noted that while Michigan

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[4] It is clear that since the establishment of a redemption period under Michigan law, the prevalant view is that legal title remains with the mortgagor. *Bankers Trust Company of Detroit v. Rose, supra.*

law limits a mortgagor's ability to cure a default where a debt has been accelerated or a sale held, case law under § 1322(b) is in disagreement on the question of whether the Bankruptcy Code deviates from state law in allowing a post-default cure. 17 Bankr. at 751. The *Thompson* Court adopted the view that § 1322(b)(5) allows the cure of arrearages and the reinstating of the original mortgage terms where the debtor files a petition prior to such time as state law cuts off the debtor's interest in the mortgaged property, i.e. the running of the statutory redemption period under Michigan law. *Id.* In so ruling, the Court reviewed provisions of the Bankruptcy Act which allowed that secured creditors need not be required to participate in Chapter XIII plans without their consent and that real estate mortgages were not "claims" for Chapter 13 purposes, (§§ 652,606). The Court noted, however, that subsequent case law held that secured creditors could be delayed in the enforcement of their liens where the effectuation of the Chapter XIII plan so required, (*Hallenbeck v. Penn Mutual Life Insurance Co., supra*). 17 Bankr. at 751-52. The Court then noted that the legislative history of 11 USC § 1322 nowhere indicates that this approach has been altered, and the Court therefore found that the protections given the secured creditor under the Bankruptcy Code are confined to that specified in the Code and identified in *Hallenbeck. Id.; see also, Taddeo,* 685 F.2d at 27-28. These protections, for a debt secured by real estate where the last payment is due after the last plan payment, include that the debt must be brought current within a reasonable time, § 1322(b)(5); that the mortgagee is to receive regular payments at the contract rate, § 1322(b)(2); and that the mortgagee receive the assurance of continued security, §§ 362(d)(1), 1322(b)(2). In *Thompson,* as in the present case, the creditor had not alleged that its security would be impaired by the debtor's plan, and the plan proposed to bring the mortgages current and to continue regular payments.

The mortgage in the present case strenuously argues that the decisions in *Taddeo* and *Thompson* misconstrue the relationship between the Bankruptcy Code and state law and ignore the mandate that property rights must be defined under the laws of Michigan. Appellee contends that under Michigan law, after the foreclosure sale the note and mortgage have merged into the sheriff's deed and cease to exist; that the mortgagor retains only a right of redemption during the statutory period of redemption after a foreclosure sale and the equity of redemption passes to the purchaser, which he may assign or transfer. (Appellee's Brief on Appeal, at 10, 11). The mortgagee questions the Court's ability to impair the rights of the bidder if the Court "reinstates a mortgage which ceased to exist" or "orders the successful bidder to reconvey this interest in the property to the mortgagor." (*Id.* at 12). This argument fails to account for the interest the debtor retains until the expiration of the redemption period, and, whether legal title in fact becomes property of the estate of a Chapter 13 petition, the legal title has *not* vested in the purchaser until such time as the period allowed for redemption expires. *Bankers Trust Company of Detroit v. Rose*, 322 Mich. 256 (1948). The debtor's power to cure a default on a mortgage by application of § 1322(b)(5) continues until such time as state law cuts off the debtor's interest in the property, and is not limited by the contract terms which allow for acceleration or even foreclosure sale until the redemption period expires.

This is consistent with the rehabilitative purposes which underlie Chapter 13. And, as pointed out in *Thompson*:

> Furthermore such a reading as is proposed by the mortgagees would virtually eliminate subsection (b)(5) from the Code. In nearly every instance in which a homeowner debtor files a petition in Chapter 13, the mortgage debt has been accelerated. To suggest that such a debtor's remedy is limited to payment of the full amount of the mortgage debt is to

> render the remedy in § 1322(b)(5) unavailable to all but a select number of debtors. Furthermore, such a reading would encourage mortgagees to accelerate a debt as soon as possible after any default occurs in order to improve their position should the mortgagor file Chapter 13 proceedings.

17 Bankr. at 753.

The argument of the mortgagee herein is that the Court in *Thompson* fails to understand Michigan foreclosure laws and the significance of pre and post-foreclosure rights of the creditor. This argument amounts to that put forth by the mortgagee in *Taddeo*, i.e. that because a mortgagee can accelerate a mortgage, or, in this case, sell by foreclosure, the debtor can only cure as provided by state law. As the Court in Taddeo pointed out, "this interpretation of § 1322(b) would leave the debtor with fewer rights under the Bankruptcy Code than under the old Bankruptcy Act of 1898,"[5] and "[d]efaulting mortgag[ors] would forfeit their right to cure even before the start of foreclosure proceedings, before they have hired lawyers and therefore before they knew anything about their rights under Chapter 13." 685 F.2d at 29. Application of state law as proposed by the mortgagee herein would override the rehabilitative purpose of Chapter 13.

This being the case, we will not address the issue of the tolling of the statutory redemption period beyond that automatically invoked upon the filing of the Chapter 13 petition.[6] Once filed, a Chapter 13 petitioner has avail-

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[5] See, *In re Freed & Co.*, 534 F.2d 1235, 1239 (6th Cir. 1976).

[6] Section 362(a) of the Bankruptcy Code provides in pertinent part:

> (a) Except as provided in Subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title operates as a stay applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, ad-

able the protection of § 1322(b)(5) upon the Court's consideration of the proposed reorganization plan and within the confines of the section itself as it protects creditors.[7]

In accordance with the above reasoning the Court finds that the Bankruptcy Court erred in its denial of the appellant's Motion for Stay and rejection of the proposed reorganization plan. Accordingly, this Court will vacate the decision of the Bankruptcy Court and remand this case for proceedings consistent with this Opinion. An appropriate Order will be entered.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

Dated: July 18, 1983

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ministrative, or other proceedings against the debtor that was or could have been commenced before the commencement of the case under the title, or to recover a claim against the debtor that arose before the commencement of the case under this title; * * *

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

[7] While we decline to stay this matter pending clarification from the Court of Appeals for the Sixth Circuit, we are mindful that two decisions of this Court, *In re Rutterbush*, civ. ac. no. 81-40270 (decided September 24, 1982, E.D.Mich) (Newblatt J.) and *In re Johnson*, civ ac. no. 82-73814 (decided December 15, 1982) (Boyle J.) have taken the contrary view of the effect of § 1322(b)(5) in post-foreclosure sale cases on appeal from denials of stay by the Bankruptcy Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Bankruptcy No. 82-06216

Consolidated Civil Nos. 82-74539 and 83-0335

IN RE: RALPH MILLER

RALPH MILLER,
*Debtor-Appellant,*

—v—

FIRST FEDERAL OF MICHIGAN,
*Appellee.*

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ORDER

This matter having come before the Court on appeal from a decision of the Bankruptcy Court, and the Court having reviewed the briefs of the parties and heard the oral arguments of counsel, being otherwise fully advised in the premises and for the reasons set forth in the Opinion herein attached

The decision of the Bankruptcy Court is hereby VACATED and IT IS ORDERED that this case be REMANDED to the Bankruptcy Court for proceedings consistent with the attached Opinion.

/s/ Thomas P. Thornton
THOMAS P. THORNTON
United States District Judge

Dated: July 18, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Honorable Patricia J. Boyle
Civil Action No. 82-71868
Bankruptcy No. 82-02536-G

EDWARD J. PIGLOSKI and MARY L. PIGLOSKI,
*Debtors-Appellants,*

—vs—

MAXINE WYNN and MANOR MORTGAGE COMPANY,
*Appellees.*

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## MEMORANDUM OPINION AND ORDER AFFIRMING ORDER OF BANKRUPTCY

This is an appeal from a bankruptcy decision of Judge Graves denying appellant's request to stay or toll the statutory redemption period for payment under a wrap-around mortgage. Appellants are consumer debtors who secured a mortgage in June, 1981. After four months of accumulated arrearage, appellants defaulted, and appellee commenced a foreclosure by advertisement, and a sheriff's sale was conducted on November 20, 1981. On April 30, 1982, appellants filed a motion for a stay order tolling the redemption period. The redemption period was due to expire on May 20, 1982. Judge Graves granted the motion and conducted a hearing on May 18, 1982, at which time the court considered appellants' contention that the automatic stay provision of 11 U.S.C. § 362(a) applies to toll the running of the redemption period, and in the alternative that under the authority of *Bank of the Commonwealth v. Bevan*, 13 Bankr. 989 (E.D. Mich.

1981) (Guy, J.), the bankruptcy court has the authority to issue a separate stay order tolling the redemption period pursuant to 11 U.S.C. § 105. Pursuant to its own opinion in *In re James*, 20 Bankr. 145 (Bankr. E.D. Mich. 1982), the court rejected both contentions. Appellant now appeals that decision. Judge Graves issued a stay pending appeal as to this ruling.

First with respect to the automatic stay provision, section 362(a) provides in relevant part:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate . . . .

While I recognize the important function served by this automatic stay provision in the Bankruptcy Code, that of giving the "debtor a breathing spell from his creditors," *see* H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 340 (1977), 1978 U.S. Code Cong. & Ad. News, pp. 5963, 6296-97, I join with Judge Guy and with the judges of the bankruptcy court in concluding that this section does not apply to the "act" of the running of the redemption

period in that section 108 speaks explicity to suspension of time periods. See *Bevan, supra.* As was noted in *Bevan*:

> Section 108(b), as it effects [sic] the amount of time given the trustee to file "any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act," grants the trustee a minimum of sixty days or the running of the period, whichever is longer, in which to act.
>
> Under the language of § 362(a), an automatic stay applies to "acts", "proceedings", and their "continuation", and "enforcement" of judgments against the debtor or property of the estate, *and does not effect the running of specific time periods* unlike § 108 which speaks explicitly to that issue . . . .
>
> . . . While a stay tolling the running of the statutory period would give the debtor greater protection than that contemplated by § 108, this court finds that where one section of the Bankruptcy Code explicitly governs an issue, another section should not be interpreted to cause an irreconcilable conflict. *Richards v. United States,* 369 U.S. 1, 11 (1969).

*Id.* at 993-94. The court concluded that to give effect to the automatic stay provisions of section 362(a) and to hold that an indefinite and automatic stay is applicable to toll the running of the redemption period would render the explicit limitations of section 108 "superfluous." I agree with that reasoning and conclude, as the bankruptcy courts have (at least implicitly), pursuant to the *James* decision, that section 362(a) does not toll the runing of the statutory period of redemption.

Appellant argues alternatively that section 105 of the Code provides a means to toll the redemption period. Under 11 U.S.C. § 105, "(a) The bankruptcy court may issue any order, process, or judgment that is necessary

or appropriate to carry out the provisions of this title." This court finds, however, that this broad grant of authority under section 105 must be read in conjunction with the limiting provisions of 11 U.S.C. § 108(b), which provide:

> [I]f applicable law, an order entered in a proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; and
>
> (2) 60 days after the order for relief.

Consistent with the analysis which underpins the holding in *Bevan*, the broad remedial provisions of section 105 must give way to the explicit sixty-day limitations period in section 108 so as to avoid an irreconcilable conflict between these two sections. As was noted by Judge Newblatt recently in *In re Rutterbush*, No. 81-40270 (E.D. Mich. Sept. 24, 1982):

> Section 108(b) is a clear Congressional command that the rights of a redemption purchaser can be stayed for no longer than sixty days. It is a basic Constitutional Article III premise that Congress can regulate the range of judicial review provided that Congress acts within the bounds of the Constitution. Nobody would seriously contend that it is unconstitutional for Congress to limit the tolling period with respect to redemption purchasers to a mere sixty days. Accordingly, section 108(b) must be given

> effect [notwithstanding appellant's request for a thirty-month stay pursuant to section 105].

Slip op. at 3. Appellant in the instant matter prayed for a *Bevan*-type stay, pursuant to section 105, presumably for an indefinite period of time. Having concluded that section 105 is limited, if not overruled, by section 108, the order of the bankruptcy court denying appellant's request for a stay pursuant to 11 U.S.C. § 105 is hereby affirmed.

Appellant argues further that, pursuant to 11 U.S.C. § 1322, the trustee may cure the "consequences" of default even after the expiration of the redemption period and that the "consequences" may include the acceleration of the mortgage and the "curing" of the foreclosure sale.

An analysis of the question of whether a trustee may cure the consequences of a mortgagor default, including a foreclosure sale, must begin with an analysis of what occurs upon a foreclosure sale. The title conveyed by foreclosure sale is all the right, title, and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him. *Stolte v. Krentel*, 271 Mich. 98, 105 (1935) *cited in James*, 20 Bankr. at 148.

> A foreclosure of a mortage extinguishes it. When the amount due under the mortgage is paid to the mortgagee by the purchaser at the sheriff's sale, the lien is destroyed, and the purchaser becomes the owner of an equitable interest in the mortgaged premises which ripens into a legal title if not defeated by redemption as provided by law.

*Dunitz v. Woodford Apartments Co.*, 236 Mich. 45, 49 (1926). While it is clear that a mortgagor retains the right to redeem until the redemption period runs, *see Heimerdinger v. Heimerdinger*, 299 Mich. 149 (1941), this statutory provision vests in the mortgagor only the

right to redeem by depositing with the mortgagee or purchaser "the sum which was bid therefor, with interest from the time of the sale at the rate per cent, borne by the mortgage . . . ." M.C.L.A. § 600.3240. The right to redeem is distinct, however, from the right *to cure* a default, which is the right to resume the normal payment schedule upon the payment of arrearages owing. A foreclosure sale is most analogous to a judgment by foreclosure in that it vests in the purchaser of the mortgage, or the mortgagee, an expectation of full title upon the expiration of the redemption period if the mortgagor fails to redeem. *James*, 20 Bankr. at 148. A foreclosure sale and final judgment by foreclosure are essentially in the same category, distinct from an acceleration of the mortgage, as consequences of default. The former occurrences extinguish the mortgage and are, hence, not subject to cure under section 1322(b)(5). *In re Taddeo*, 9 Bankr. 299 (Bankr. E.D.N.Y. 1981), *aff'd*, 685 F.2d 24 (2d Cir. 1982). *Contra In re Thompson*, 17 Bankr. 748 (Bankr. W.D. Mich. 1982).

In sum, I conclude, as the court did in *James*, that there is indeed a distinction between the acceleration of a debt and a foreclosure sale in that the latter terminates the mortgage and consequently terminates the mortgagor's rights under the mortgage, other than that of redemption. As was noted in *James*, where the mortgage is no longer in existence and where title in the mortgage has passed to the purchaser, the requirement under section 1322(b)(5) that "the last payment is due after the date on which the final plan is due" is not satisfied for the simple reason that there is no longer a mortgage, and hence, no payments are "due". As Judge Graves described in *James*, "[d]ebtors cannot reactivate a mortgage that was already merged into a judgment of foreclosure before the debtors filed their Chapter 13 petition. . . . [A] Bankruptcy Court 'cannot cultivate rights where none can grow . . . .'" *In re James*, 20 Bankr. 149 (ellipsis in original).

Accordingly, this court concluding that the trustee may not cure the default after a foreclosure sale pursuant to section 1322(b)(5), that aspect of the order of the bankruptcy court is likewise affirmed.

IT IS SO ORDERED.

/s/ Patricia J. Boyle
PATRICIA J. BOYLE
United States District Judge

Date: 29 Mar. 1983
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Docket Number 82-71868

Hon. Patricia J. Boyle

EDWARD J. PIGLOSKI, *et al.*

v.

MAXINE WYNN and MANOR MORTGAGE CO.

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JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the Bankruptcy Court is affirmed; that the Appellants Edward J. Pigloski and Mary L. Pigloski take nothing; and that the action be dismissed on the merits.

ROBERT A. MOSSING
Clerk

/s/ Mary W. Farin
Deputy Clerk

Date—3-31-83
Detroit, Michigan

## APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Chapter 13 No. 82-06216-W

IN RE: RALPH MILLER,
Soc. Sec. No. 369-28-7174
*Debtor.*

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ORDER DENYING DEBTOR'S MOTION FOR STAY ORDER TOLLING REDEMPTION PERIOD AND RESTRAINING THE WAYNE COUNTY SHERIFF FROM ISSUING A SHERIFF'S DEED

At a session of said Court, held in the City of Detroit, County of Wayne and State of Michigan. On: Dec. 2, 1982

Present: HONORABLE GEORGE E. WOODS,
Bankruptcy Court Judge

Debtor's Motion for Stay Order Tolling Redemption Period and Restraining the Wayne County Sheriff from Issuing a Sheriff's Deed came on for hearing before the Honorable George Woods on November 9, 1982. Debtor, appeared through his attorney Mary Ann Zito, Esq., and Defendant, through William Stanley Fambrough, Esq.

Upon consideration of the pleadings filed herein and the argument of counsel,

IT IS HEREBY ORDERED that Debtor's motion is denied for the reasons stated in *In Re: Troy Lee James, et al*, Bankruptcy Reporter (1982).

/s/ George E. Woods
Bankruptcy Court Judge

Approved as to form:

/s/ W. Stanley Fambrough
W. STANLEY FAMBROUGH

/s/ Matthew J. Mason
MATTHEW J. MASON

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Chapter 13 No. 82-06216-W

IN RE: RALPH MILLER,
*Debtor,*

RALPH MILLER,
*Appellant,*

v.

FIRST FEDERAL OF MICHIGAN,
*Appellee.*

---

ORDER GRANTING RELIEF FROM AUTOMATIC STAY AND DENYING CONFIRMATION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan.

ON: 24 Jan. 1983

Present: HONORABLE GEORGE E. WOODS,
Bankruptcy Court Judge

The matter having come on for confirmation hearing on January 11, 1983, and it appearing that First Federal of Michigan has filed objections to the Plan because it had foreclosed the mortgage in question by Sheriff's sale on May 14, 1982 prior to the date of filing the Chapter 13, and the court finding that 11 USC 362 does not toll the redemption period, and that the debtor may not cure a mortgage default after Sheriff's sale;

IT IS HEREBY ORDERED THAT the objection filed by First Federal of Michigan is sustained.

IT IS FURTHER ORDERED that the automatic stay is lifted.

IT IS FURTHER ORDERED that Debtor's motion for confirmation is denied.

/s/ George E. Woods
Bankruptcy Court Judge

Approved as to form and content:

/s/ Matthew J. Mason
MATTHEW J. MASON (P-29678)
Attorney for Debtor
UAW LEGAL SERVICES PLAN
200 New Center Building
Detroit, Michigan 48202

/s/ W. Stanley Fambrough
W. STANLEY FAMBROUGH
Attorney for First Federal of Mich.
1001 Woodward Avenue
Detroit, Michigan 48226

TRANSCRIPT OF PROCEEDINGS
MAY 18, 1982

[19] I'd like to say that the briefs were so well done that it makes the job easy but because they're so good, it makes it harder, and this is an issue that's been argued almost every other week since I've become a Judge.

At the first of this year, and as the parties are aware, I have had a number of cases on the docket that are under advisement on this issue, and these people were contacted, and directed to be here this morning for the announcement of an Opinion, and for the sake of moving this matter along, and other matters that are under advisement.

It appears that the matter of Edward J. and Mary L. Pigloski will be the first one to be disposed [20] of in this fashion.

The ruling that the Court is now about to announce is taken from the Opinion that will be issued today in the matter of Troy Lee James, 81-04754-G; McDavid Hathorn 81-04163-G; Marilyn Blacksher, 81-06484-G; Rebecca R. Brown, 81-07213-G, Adversary Number 82-0172. This Opinion will be in final form today, and will be available for the both of you, and for Counsel in those cases that I've just put into the record.

As far as the four cases just announced, I'm not going to discuss the facts in those cases. The facts in this case are equally applicable to the Opinion, and I see no reason, based on what I've heard and read, to change what I'm now about to announce.

The question presented by the consolidated cases that I've referred to, as well as the matter of Edward Pigloski and Mary Pigloski, as simply stated, turn to a single issue.

Does the United States Bankruptcy Court have authority to issue an order pursuant to 11 U.S.C., Section 105, and my other stautory Sections that may be restated, to toll a stautory period of redemption, so as to allow a

Chapter 13 Debtor to reinstate the terms of the mortgage legally in default in a plan pursuant to 11 U.S.C., Section 1322 (b) (5).

This point concerns Section 105, and the other statutory Sections presented in the arguments in this [21] in this case, and in the other cases. Section 105 does not empower a Bankruptcy Court to toll a state stautory period of redemption so as to enable the Chapter 13 Debtor to reinstate the terms of the mortgage in default in the plan pursuant to 11 U.S.C., Section 1322 (b) (5).

Section 1322 (b) (5) allows the cure of any default within a certain period of time. Subject to subsections (a) and (b) of this Section, the plan may: (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time, and maintenance of payments while the case is pending on any unsecured claim, or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

Section 105 allows the Court to issue any Order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The Debtors would have this Court believe that Sections 1322 (b) (5) and 105 (a) support the proposition that a mortgage allegedly in default, but which, in fact, has been foreclosed, may properly be revived, and the original terms reinstated in the plan of reorganization, especially where it is averred that the properties are necessary to an effective reorganization. This proposition, however, finds no basis in law or in equity.

First and foremost Section 1322 (b) (5) [22] directly affects state-created property rights which were to be arranged under the support of 440, United States, Report 48, at page 55: property interests are created and defined by state law. Unless some federal interest requires a different result, t'ere is no reason why such interests should be analyzed diff- differently simply because an interested party is involved in a Bankruptcy proceeding. Uniform treatment of property interests by both State

and Federal Courts, within a State, serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Under Michigan law, a purchaser at a foreclosure sale takes the property subject to the mortgagor's right of statutory redemption. That is Ledyard versus Phillips, 47 Mich. 305, a decision made a hundred years ago, 1882, which is still the law of this state.

The title thus conveyed to the purchaser is all the right, title and interest in the mortgaged premises which the mortgagor possessed when the mortgage was executed.

In Stolte versus Krentel, 271 Mich. 98, this title vests in the purchaser only upon the expiration of the stautory redemption period.

Bankers Trust Company of Detroit versus Rose, 322 Mich. 256. The mortgagor still retains a [23] significant amount of interest in the premises, in addition to its stautory right of redemption; specifically, the right to possession, and the right to rents and profits, until the redemption period expires. You might add that the purchaser has an interest to proceed in that regard.

The purchaser at the foreclosure sale also has an interest to be protected. Section 1322 (b) (5) apparently allows a mortgage allegedly in default to be cured, and the original terms to be reinstated in the plan when the last payment on the mortgage is due after the date on which the final payment under the plan is due.

The legislative history states that a claim secured by the Debtors principal residence may be treated with under 1322 (b) (5). This section is applicable only where the debtor/mortgagor's equity of redemption has not been foreclosed. Because a foreclosure sale under Michigan law extinguishes the mortgage and transfers legal title to the purchaser, Ledyard versus Phillips, the mortgagor is left with its stautory right to redeem from the sale within six months pursuant to M.C.L.A. 600.3140, as amended by 1970 Public Act 86.

Therefore, payment can no longer occur in accordance with the due date on the mortgage but, at the most, can only be made within six months from the date of foreclosure as statutorily prescribed.

Hence, by it's own terms, 1322 (b) (5) [24] is inapplicable, since that statute requires fulfillment of the terms of the plan prior to the date of the final payment under the mortgage.

Th principle has been most succinctly stated that debtors cannot reactivate a mortgage that was already merged into a judgment of foreclosure before the Debtors filed their Chapter 13 petition. A Bankruptcy Court cannot cultivate rights where none can grow.

As to the individual Debtors in the cases under advisement, and in this case, their properties were sold at foreclosure sales, and their mortgages extinguished thereby, all occurring prior to the filing of their Chapter 13 petitions.

Because payments can no longer be made in accordance with the due dates on the mortgages, the inevitable conclusion is that the terms of their respective mortgages cannot be reinstated in the proposed plans of reorganization under 1322 (b) (5).

Counsel for Debtors in other cases, and in this case, have argued that even if Section 1322 (b) (5) precludes an opportunity for cure, this Court should, nevertheless, exercise its equitable powers under 11 U.S.C., Section 105, and issue an Order tolling Michigan's statute of redemption in order to allow the Debtors to make current their arrearages, and to continue to make monthly mortgage payments while under the [25] protective umbrella of Chapter 13.

This Court is unwilling to transcend the boundaries within which we may exercise our equity powers and, therefore, we find that Section 105 does not authorize this Court to toll a state stautory period of redemption.

Although a Bankruptcy Court is a Court of equity, and as such may invoke equitable principles, limitations on the exercise of those equitable powers do, in fact, exist.

Section 105, upon which the Debtors in part rely, provide that the Bankruptcy Court may issue any Order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

The legislative history to this code provision states that Section 105 is derived from Section 2a(15) of the Act. The same principles of equity and limitations thereon that exist under the Code, also existed under the Act. "A Bankruptcy Court is a Court of equity, and is guided by equitable doctrines and principles, except insofar as they are inconsistent with the Act."

Section 2a(15) of the Bankruptcy Act was viewed as an express legislative sanction of the Bankruptcy Courts power to enjoin actions of parties.

That Section 2a(15) was intended to effect parties' actions rather than state statutes is clear: "the chief test under section 2a(15) appeared to be whether or [26] not the proceeding in the non-bankruptcy Court sought to be enjoined interfered with the possession or custody of the Bankruptcy Court or unduly impeded or embarassed the Court in its administration under the Act." That language is from 2 Collier on Bankruptcy at 105-4, fifteenth edition.

Section 105 of the Bankruptcy Code retained this broad grant of equitable powers, but at the same time, caution is urged. The basic intention of the section is to enable the Bankruptcy Court to do whatever is necessary to aid its jurisdiction, anything arising in, or relating to, a Bankruptcy case.

Debtors at bar do not put forth any evidence of interference with, or impairment of, this Courts jurisdiction. Rather, the argument is the Debtors would have this Court interfere with a States legislative judgments concerning the rights of parties to a mortgage agreement, and no compelling justifications for such interference exist.

The Debtors in these cases, and in the case today, are asking the Court to enter into a revision of State law that is properly the concern of the Michigan Legislature.

If the State of Michigan wishes to extend the time for redemption of property after a foreclosure sale, it is well within the province of the Michigan Legislature to pass such a bill. It is well within the power of the Governor of the State of Michigan to sign it into law.

[27] The Legislatures silence on this issue is a clear indication to the Court of a disinclination to change the six month redemption period, and this Court is not about to step into the arena and revise the statute.

Cases invoking equitable principles and relief generally involve situations where fraudulent conduct has occurred, or where a manifest injustice would occur absent equitable relief.

Equity is available to protect property rights of the innocent debtor from the wrongful acts of other persons, however, equity does not extend to situations in which the debtor is simply unable to make the required payment within the prescribed time. That language is from Headley, 13 Bankruptcy Reports, 295, a decision of the Bankruptcy Court in Colorado in 1981.

The decision of the United States District Court for the Eastern District of Michigan, in Bank of the Commonwealth versus Bevan, 13 Bankruptcy Report, 989, decided in 1981, holds, in part, that Sections 105 and 108 of the Code grant Bankruptcy Courts the authority to stay the running of the redemption period for sixty days.

Bevan does not discuss the ordinary meaning of the words contained in Section 108 (b) or its effect on Michigan's Statutory Redemption Period.

An ordinary reading of Section 108 (b) [28] reveals no express or specific provision granting Bankruptcy Courts the authority to stay the running of the States redemption period for sixty days, as suggested in Bevan, or indefinitely, as urged by the Debtors in the instant cases.

It may be argued that Section 108 (b) gives this Court the authority to enter a sixty day stay so that the Debtor may cure a default, but this argument must give way to

the State protected property interest, and the deference Federal Courts must give to State Law in this case.

Under State Law there is no default to be cured after the mortgaged premises have been sold at a foreclosure sale. The Debtors only remedy is to make full payment of the price of the successful bid at the foreclosure sale. The opportunity to sure the default exists after foreclosure, but before foreclosure sale.

Section 108 (b) cannot be read to revive the opportunity to cure a default after the foreclosure sale without abrogating clearly established State Law. We are not willing to rewrite the foreclosure statute, or try to revive the opportunity to cure a default when done after the foreclosure sale.

With respect to the cases under consideration, no wrongful acts, fraud, or unfairness have been established by anything that's been presented in Court. The Debtors freely entered into mortgage agreements with their [29] respective creditors. At the time the notes and mortgages were executed, the Plaintiff creditors expected that payments would be timely made, while the Debtors expected that they would possess their premises conditioned upon the ability to satisfy the loan obligations.

Upon foreclosure sale, Michigan law allows the Debtors, as a matter of privilege, six months to redeem from the sale. The purchasers at the sale in the cases under advisement, the Plaintiffs, have the right to expect either repayment of the bid price together with accrued interest during the redemption period, or the vesting of legal title at the expiration of the redemption period.

Action by this Court which would thwart state policy, and diminish the parties expectations, is not warranted by the facts presented in the cases under advisement, or this case.

Thus, this Court may not issue an Order pursuant to 11 U.S.C., Section 105 (a) which tolls Michigan's statutory redemption period.

I'll have your Order entered in accordance with this Opinion.

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Chapter 13 No. 82-02536-G

IN THE MATTER OF EDWARD J. PIGLOSKI
Soc. Sec. No. 382-36-4484

MARY L. PIGLOSKI
Soc. Sec. No. 373-42-7067

*Debtors.*

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ORDER DISSOLVING TEMPORARY RESTRAINING ORDER AND PROHIBITING THE INCLUSION OF DEBTORS' PERSONAL RESIDENCE IN A FILED CHAPTER 13 PLAN NUNC PRO TUNC TO MAY 18, 1982 AND STAYING EFFECT

At a session of said Court, held in the City of Detroit, Wayne County, State of Michigan, 27 Aug. 1982.

Present: Honorable RAY REYNOLDS GRAVES, Judge in Bankruptcy

The matter having come before this Court on a Motion of the Debtors herein, both parties having submitted written briefs and oral arguments heard on both May 12, 1982 and May 18, 1982, the Court having been fully advised in the premises and the Court having found that the Court is without the authority over the Debtors' principal residence to allow its inclusion in the Debtors' Chapter 13 Plan, or to issue an injunction staying the running of the state statutory right of redemption where the residence has been foreclosed, sold at sheriff sale and that the Debtors' only remaining right is that of a statutory right of redemption;

IT IS HERBEY ORDERED that the Temporary Restraining Order issued May 3, 1982, by the Honorable Ray Reynolds Graves be hereby dissolved;

IT IS FURTHER ORDERED that the Court does not have the authority to affect or modify the mortgagee's rights in the principal residence of the Debtors or to issue an injunction tolling the running of the state statutory right of redemption;

IT IS FURTHER ORDERED that Maxine Wynn and Manor Mortgage Company, their attorneys, agents, assigns or any person acting on their behalf are entitled to, and may therefore commence or continue any further summary proceedings for eviction against Edward J. and Mary L. Pigloski from the property in question at 35503 Marroco Drive, Mt. Clemens, Michigan;

IT IS FURTHEF ORDERED that in accordance with Stay Order Pending Appeal and Restraining Order, entered by this Court on May 20, 1982, the effect of this Order is stayed pending appeal.

/s/ Ray Reynolds Graves
RAY REYNOLDS GRAVES
Judge in Bankruptcy

Approved as to Notice and Form:

/s/ Mary Ann Zito
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